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HOUSE OF REPRESENTATIVES
REPORT
101-87

CLAIMS FOR NEGLIGENT MEDICAL CARE PROVIDED MEMBERS OF THE ARMED FORCES

JUNE 15, 1989.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 536]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 536) to amend chapter 171 of title 28, United States Code, to allow claims against the United States under that chapter for damages arising from certain negligent medical care provided members of the Armed Forces, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. CLAIMS FOR NEGLIGENT MEDICAL CARE.

(a) COGNIZABLE CLAIMS.—Chapter 171 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 2681. Certain claims arising out of medical care provided members of the Armed Forces

"(a) CLAIMS AUTHORIZED.—Subject to the provisions of this chapter, claims may be brought under this chapter for damages against the United States for personal injury or death of a member of the Armed Forces serving on active duty (as defined in section 101(22) of title 10) or on full-time National Guard duty (as defined in section 101(42) of title 10), under the conditions prescribed in this section.

"(b) LIMITATION TO MEDICAL CARE IN FIXED FACILITIES.—The personal injury or death referred to in subsection (a) must have arisen out of noncombatant medical or dental care furnished the member of the Armed Forces in a medical facility operated by the Secretary of a military department or any other medical facility operated by the United States.

"(c) REDUCTION OF AWARDS OR JUDGMENTS BY OTHER GOVERNMENT BENEFITS.—The amount of an award or judgment on a claim under this section for personal injury or death of a member of the Armed Forces shall be reduced by the agency making

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the award, or the court entering the judgment, as the case may be, by an amount equal to the total amount of other monetary benefits received or to be received by the member and the member's estate, survivors, and beneficiaries, under title 10, title 37, or title 38 that are attributable to the personal injury or death from which the claim arose. If the amount of future benefits cannot be determined because the benefits are provided under an annuity or other program of periodic payments, the amount of the reduction with respect to such future benefits shall be the actuarial present value of such future benefits.

"(d) DEFINITIONS.—For purposes of this section—

"(1) the term 'medical facility' means a medical center, hospital, or clinic that is located in a building or structure; and

"(2) the term 'personal injury' does not include mental or emotional disability unless it is the direct result of a physical injury.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 171 of title 28, United States Code, is amended by adding at the end the following new item:

"2681. Certain claims arising out of medical care provided members of the Armed Forces.".

SEC. 2. EFFECTIVE DATE.

Section 2681 of title 28, United States Code, as added by section 1 of this Act, shall apply only with respect to personal injuries or deaths occurring on or after the date of the enactment of this Act.

PURPOSE

The purpose of the bill, H.R. 536, is to amend chapter 171 of title 28, United States Code, so as to allow active duty military personnel to bring suit against the United States for damages for personal injury or death which is the result of noncombatant negligent medical or dental care provided in medical facilities operated by the Department of Defense or the United States.

BACKGROUND

The United States, as sovereign, is immune from suit unless it consents to be sued. The Federal Tort Claims Act (FTCA), enacted in 1946, constitutes a limited waiver of sovereign immunity by the United States. Under the FTCA, the Federal Government is liable for tort claims based on the negligent act or omission of any government employee while acting within the course and scope of his office or employment. The FTCA has two exceptions which are relevant to H.R. 536:

SECTION 2680. EXCEPTIONS

The provisions of this chapter and section 1346(b) of this title shall not apply to—

* * * * * * *

(j) any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) any claim arising in a foreign country.

* * * * * * *

The FTCA contains no provision concerning negligence committed by the government against active duty military personnel in noncombat situations, during peace time, or in any situation involving medical malpractice.

Nevertheless, in 1950, the Supreme Court ruled in *Feres* v. *United States,* 340 U.S. 135 (1950), that the FTCA does not permit active duty military personnel to sue the government for damages

arising from government action or inaction, even though the statute contains no explicit provision on this issue. This rule of law has become known as the *Feres* Doctrine.

At the same time the Supreme Court issued its ruling in *Feres*, it applied the ruling to two other cases, *Jefferson* v. *United States*, 178 F.2d 518 (4th Cir. 1949), and *United States* v. *Griggs*, 178 F.2d, (10th Cir. 1949), both of which were claims for medical malpractice. Thus, under the *Feres* Doctrine, active duty military personnel may not sue the governemnt for medical or dental malpractice.

H.R. 536 would make a limited exception to the *Feres* Doctrine for medical malpractice.

At the present time, two-thirds of the individuals treated in military facilities have the right to sue for medical malpractice. Active duty military personnel constitute only one-third of the total number of people treated in military medical facilities and are the only individuals barred from suit by the *Feres* Doctrine.

Over the years, many members of the Armed Forces who have suffered from medical malpractice in military hospitals have been affected by the *Feres* Doctrine. The Subcommittee on Administrative Law and Governmental Relations heard testimony which provided detailed examples of the suffering endured by these people. For example, one witness, Dawn Lambert, testified that because of medical neglect during surgery for an ectopic pregnancy in which numerous sponges and a radiopaque marker were left in her body, she is unable to ever have children. Ms. Lambert's surgery was performed in January, 1982 by the medical staff at Portsmouth Naval Regional Medical Center in Norfolk, Virginia, while she was serving on active duty with the United States Navy. Although she had a temperature of 100.4, heavy drainage from the incision and no bowel function, she was released from the hospital the day after the surgery. Ms. Lambert spent her convalescence leave at her parents in Wisconsin and while there was treated for an infection. Because of continuing discomfort, Ms. Lambert requested a follow-up gynecological examination when she returned to Norfolk. After this examination, she was told there was nothing wrong and instructed to stop taking the medication she had been prescribed in Wisconsin. Although Ms. Lambert continued to feel ill and attempted to determine the cause of her discomfort, a lump in her abdomen continued to grow, it was not until December, 1982, that a private physician saw Ms. Lambert and performed surgery. It was during this surgery that the sponges and radiopaque marker were discovered and removed. Ms. Lambert was 20 years old at the time of this incident and as a result of this medical neglect will never be able to bear children.

Another example was presented by the mother of a deceased Army lieutenant, Robert Lee Rawls. Lieutenant Rawls died because of medical neglect of a staph infection which damaged his heart valves. He suffered considerably, undergoing open-heart surgery twice within a four month period. He did not survive the second operation. The staph infection is believed to have been caused by a puncture wound in his foot from a nail in his boots. Despite a temperature of 105 degrees and tests indicating a kidney infection, Lt. Rawls made four trips to the unit dispensary and emergency room at Womack Army Hospital, Fort Bragg, North Carolina, before

being admitted to the hospital. Diagnosis and treatment of a staph infection must be prompt in order for the patient to survive. Lt. Rawls died at 25 years of age.

Representative Clarence E. Miller presented an example of medical neglect on behalf of his late constituent, Sergeant Timothy J. Adkins, U.S.M.C. Sgt. Adkins died 16 days after having a tooth extracted at the Branch Dental Clinic, Marine Corps Air Station, Beaufort, South Carolina. The report of the Department of Defense Inspector General indicates that the follow-up care given Sgt. Adkins was "substandard". A review of Adkins' case indicated various delays in treatment of a post extraction infection. Sterilization areas at the Branch Dental Clinic were modified as result of Sgt. Adkins' death.

None of the victims in these three examples had any right to sue the government for the tragic injuries they suffered.

The Subcommittee also heard testimony from the Department of Defense and the Department of Justice. Both of these agencies oppose the legislation, and, in support of their position, basically reiterated the three policy considerations which the Supreme Court looked to in deciding *Feres*.

While the Committee fully supports the Court's reasoning that military personnel should not be allowed to sue the Government for negligence relating to the performance of military duties, we disagree that allowing military personnel to sue for medical malpractice will result in any breakdown in military discipline. The Committee concluded that if personnel can sue on behalf of a dependent without a breakdown in military discipline, there is no reason why military personnel bringing suit on their own behalf for medical malpractice should result in any breakdown of military discipline. In fact, this legislation should result in improved military medical care, because of the threat of the suit. Additionally, and as was testified to by several witnesses during the Subcommittee hearings, this legislation can result in improved morale within the military establishment.

The Committee does wish to make it clear that this legislation does not extend to negligence suits in general, but instead is limited to granting jurisdiction to the courts only for suits for medical malpractice which occur in medical treatment facilities operated by the United States or the Secretary of a military department. The Committee concluded that those men and women who are on active duty with the U.S. Armed Forces should be afforded the same rights as private individuals who submit themselves to medical care, even though that care is extended by the Government.

The Committee has also considered the opposition of the Departments of Justice and Defense to this legislation and the Court's reasoning behind the *Feres* Doctrine that no uniform state tort laws exist to apply to these cases. The Committee concluded that the lack of uniform state laws should not prevent military personnel from having jurisdiction, under the Federal Tort Claims Act, to bring medical malpractice suits against the Government. The Government is already amenable to suit under the various state tort laws by dependents and spouses of military personnel and by federal prisoners.

In looking to the Court's third policy consideration—the existence of a uniform and comprehensive system of statutory compensation and benefits that are available to service members—the Committee concluded that the provision in the legislation which requires the reduction of any settlement or judgment by the present value of any benefits that the member may be entitled to adequately deals with the Court's concern that the Government would have to pay twice for the same injury.

H.R. 536 constitutes a very narrow and limited waiver to the *Feres* Doctrine and does not purport to rewrite the FTCA. The purpose of the bill is to allow active duty military personnel the same rights afforded to all others who use government medical facilities. Since retirees, dependents, and even federal prisoners can sue the government for medical malpractice which occurs in a government hospital, it is a matter of justice and equity that active duty military personnel be afforded the same right. Even so, the bill provides only a narrow exception to the *Feres* Doctrine by not extending its coverage to ships at sea, field hospitals, and hospitals operated by the United States government but located on foreign soil.

SUMMARY OF H.R. 536

H.R. 536 would amend the Federal Tort Claims Act to allow active duty military personnel to sue for damages that arise from medical malpractice. The existing exemptions and exclusions of the FTCA would apply to such cases. Under the FTCA, the law of the situs governs the law to be applied to a particular claim.

H.R. 536 adds a new section 2681 to chapter 171 of title 28, United States Code. This section would provide jurisdiction under the FTCA to allow active duty military personnel to sue the United States gvoernment for medical or dental malpractice which occurs in a medical facility operated by the Department of Defense or the United States government. This section applies to personnel in the following branches of the Armed Forces: U.S. Army, U.S. Navy, U.S. Air Force, U.S. Coast Guard, individuals who are full-time duty in the National Guard, and individuals who are on full-time duty in the U.S. Armed Forces reserves.

The bill would grant the right to sue only for those claims that arise out of medical or dental care furnished to military personnel in a "medical facility" operated by the U.S. Government in peacetime or noncombatant situations. The term "medical facility" is defined to mean a medical center, hospital, or clinic that is located in a building or structure.

The word "noncombatant" was added to the bill as a modifier of medical or dental care. This language is inserted to make clear the Committee's intent that this bill is not meant to allow suits for injuries which arise during emergencies in combat situations. The Committee intends that the issue of whether a suit is applicable under this provision should be determined by where the care which generates the malpractice suit occurs, not the source of the original injury. For example, if a member of the military was injured during World War II and several years later undergoes surgery to treat a condition which arises out of the combat injury, and then is

a victim of medical malpractice, he could sue under this provision even though the initial injury occurred during combat.

The definition of "medical facility" is taken from 10 U.S.C. 2801(c)(1), the definition of medical treatment facility as used in the Military Construciton Act. Thus the bill will not permit suits resulting from medical treatment furnished in military situations in field hospitals or on ships.

The Committee recognizes, however, that the military does set up clinics in buildings that are also being used for other purposes. Under this definition of "medical facility", the Committee does not intend that the entire building must be used as a medical facility in order for this provision to apply. Rather, the Committee intends to cover facilities which are a regular medical facility, the equivalent of a clinic or hospital in the private sector, not a tent with a first aid kit which is set up for use during weekend training maneuver.

The Committee intends that the standard of care given to members of the U.S. Armed Forces to be the same fair and reasonable treatment that one would expect in the private sector. However, while recognizing that the standard of care should not differ, the Committee also noted that the nature of the military necessitates that circumstances under which medical care is provided may be different, depending on the type of care the specific facility is set up to handle. For example, the care available in a clinic set up temporarily in a empty building and used for sick call during a 2-week National Guard duty would vary from that available at Bethesda Naval Hospital.

While the Committee stresses that the courts should take into account the factors concerning the type, purpose and nature of the facility where the care is extended, it continues to stress that the combatant field-type hospitals, hospitals on ships, and foreign hospitals are not the type facilities under which claims are to be considered. Claims arising in foreign jurisdictions (28 U.S.C. 2860(k)) and during combat activities (28 U.S.C. 2860(j)) are currently precluded under the Federal Tort Claims Act and will continue to apply to the new section.

The bill defines "personal injury" so that it does not include mental or emotional disability unless these conditions result from a physical injury. This definition would therefore prohibit suits for any damage to the status or duty assignment of military personnel which might result from a negligent misdiagnosis or malpractice action.

The bill also provides for a reduction of awards or judgments by other government benefits based on the same injury. The purpose of this provision is to prevent the government from paying twice for the same injury. This provision requires that benefits paid to a service member under titles 10, 37, and 38 of the U.S. Code may be used to reduce the amount of any settlement or judgment under this new section of the FTCA.

Prior Consideration

The issues addressed in H.R. 536 have been the result of much debate and serious consideration by the House since the 98th Con-

gress. H.R. 1942, a bill similar to H.R. 536, was the subject of hearings before the Subcommittee on Administrative Law and Governmental Relations during the 98th Congress. In the 99th Congress, the Subcommittee held two days of hearings on the bill, H.R. 1161, on July 8, and 9, 1985. The Subcommittee amended H.R. 1161 and favorably recommended a clean bill, H.R. 3174, to the full Committee. H.R. 3174 passed the House on October 7, 1985, by a vote of 317 to 90. During the 100th Congress, H.R. 1054 was the subject of a hearing on March 19, 1987, and was passed by the House on February 17, 1988, by a vote 312 to 61. Neither H.R. 3174 nor H.R. 1054 was considered by the Senate prior to the adjournment of the respective Congresses.

On April 13, 1989, the Subcommittee on Administrative Law and Governmental Relations considered the bill, H.R. 536, and favorably reported it to the full Committee.

On April 25, 1989, the Committee considered the bill, H.R. 536, with amendments, and favorably reported the bill to the House with an amendment in the nature of a substitute and recommended that the House pass the bill.

Committee Vote

On April 25, 1989, a reporting quorum being present, the full Committee on the Judiciary approved the bill, H.R. 536, with a single amendment in the nature of a substitute, by a voice vote.

Oversight Statement

The Subcommittee on Administrative Law and Governmental Relations of this Committee exercises the Committee's oversight responsibility with reference to claims against the Government in accordance with Rule VI(b) of the Rules of the Committee. The favorable consideration of this bill was recommended by that Subcommittee and the Committee determined that the legislation should be enacted as set forth in this bill.

Budget Statement

H.R. 536 does not directly provide budget authority nor does it involve new or increased tax expenditures contemplated by Clause 2(l)(3)(B) of Rule XI.

Oversight Findings and Recommendations of the Committee on Government Operations

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (d) of clause 2(l)(3) of House Rule XI.

Inflationary Impact

In compliance with clause 2(l)(4) of House Rule XI, it is stated that this legislation will have no inflationary impact on prices and costs on the operation of the national economy.

COST

The costs are those outlined in the cost estimate of the Congressional Budget Office included in this report.

COST ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

The cost estimate of the Congressional Budget Office, prepared pursuant to section 403 of the Congressional Budget Act of 1974 and received by the Committee on May 2, 1989, is as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 2, 1989.

Hon. JACK BROOKS,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 536, a bill to amend the United States Code to allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care, as ordered reported by the House Committee on the Judiciary on April 25, 1989.

Based on historical evidence on malpractice judgments and workloads at military health-care facilities, CBO estimates that this legislation would cost the government about $30 million per year. Although under current law military personnel may not sue for medical malpractice, dependents and retirees may. Allowing active duty personnel to sue would result in additonal administrative and judicial awards against the United States. During fiscal years 1984–1988, the government paid about $60 million per year in malpractice settlements to dependents and retirees. Military hospitals average about 900,000 admissions per year, about 300,000 of which were for active duty military personnel. The estimate assumes that active duty military personnel would generate malpractice claims at the same rate per hospital admission and dependent and retired users of the system, but no data exists to support this assumption. It is also unknown whether malpractice award data for fiscal years 1984–1988 are indicative of future malpractice awards, but for purposes of this estimate we assume they are.

If you have any questions on this estimate, your staff may contact Eugene Bryton at 226–2840.

Sincerely,

ROBERT D. REISCHAUER.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CHAPTER 171 OF

TITLE 28, UNITED STATES CODE

CHAPTER 171—TORT CLAIMS PROCEDURE

Sec.
2671. Definitions.
2672. Administrative adjustment of claims.
2673. Reports to Congress.
2674. Liability of United States.
2675. Disposition by federal agency as prerequisite; evidence.
2676. Judgment as bar.
2677. Compromise.
2678. Attorney fees; penalty.
2679. Exclusiveness of remedy.
2680. Exceptions.
2681. Certain claims arising out of medical care provided members of the Armed Forces.

* * * * * * *

§ 2681. Certain claims arising out of medical care provided members of the Armed Forces

(a) CLAIMS AUTHORIZED.—Subject to the provisions of this chapter, claims may be brought under this chapter for damages against the United States for personal injury or death of a member of the Armed Forces serving on active duty (as defined in section 101(22) of title 10) or on full-time National Guard duty (as defined in section 101(42) of title 10), under the conditions prescribed in this section.

(b) LIMITATION TO MEDICAL CARE IN FIXED FACILITIES.—The personal injury or death referred to in subsection (a) must have arisen out of noncombatant medical or dental care furnished the member of the Armed Forces in a medical facility operated by the Secretary of a military department or any other medical facility operated by the United States.

(c) REDUCTION OF AWARDS OR JUDGMENTS BY OTHER GOVERNMENT BENEFITS.—The amount of an award or judgment on a claim under this section for personal injury or death of a member of the Armed Forces shall be reduced by the agency making the award, or the court entering the judgment, as the case may be, by an amount equal to the total amount of other monetary benefits received or to be received by the member and the member's estate, survivors, and beneficiaries, under title 10, title 37, or title 38 that are attributable to the personal injury or death from which the claim arose. If the amount of future benefits cannot be determined because the benefits are provided under an annuity or other program of periodic payments, the amount of the reduction with respect to such future benefits shall be the actuarial present value of such future benefits.

(d) DEFINITIONS.—For purposes of this section—

(1) the term "medical facility" means a medical center, hospital, or clinic that is located in a building or structure; and

(2) the term "personal injury" does not include mental or emotional disability unless it is the direct result of a physical injury.

The Department of Justice's comments on H.R. 536 are as follows:

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, May 23, 1989.

Hon. BARNEY FRANK,
Chairman, Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives, Washington, DC.

DEAR BARNEY: This responds to your letter to the Attorney General, dated February 13, 1989, concerning H.R. 536, "a bill to amend chapter 171 of title 28, United States Code, to allow claims against the United States under that chapter for damages arising from certain negligent medical care provided members of the Armed Forces." Your letter refers to H.R. 536, a bill similar to H.R. 1054 in the 100th Congress.

We appreciate the opportunity to comment on H.R. 536. I am enclosing the statement of Brent O. Hatch, Deputy Assistant Attorney General, Civil Division before the Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee concerning S. 2490 and H.R. 1054, 100th Congress, on June 17, 1988. The position of this Administration is that we strongly oppose enactment of H.R. 536 for the same reasons that we opposed nearly identical legislation introduced in the 100th Congress. As Mr. Hatch testified, any additional relief should take the form of an amendment to the Military Claims Act. H.R. 536 would have precisely the adverse impacts addressed in Mr. Hatch's statement.

We would welcome the opportunity to work with you or your staff to craft language which would address our concerns.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program and that H.R. 536 is not in accord with the program of the President.

Sincerely,

THOMAS M. BOYD,
Assistant Attorney General.

STATEMENT OF BRENT O. HATCH, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

I am pleased to appear before the Subcommittee today to present the views of the Department of Justice on S. 2490 and H.R. 1054, bills which would allow members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care.

In general, both S. 2490 and H.R. 1054 would permit claims against the United States under the Federal Tort Claims Act for the personal injury or death of a member of the Armed Forces serving on active duty when the claim arises out of medical or dental care furnished in medical facilities operated by the United States. If enacted, these proposals would essentially overrule a sound, long-standing, and viable rule of law known as the *Feres* doctrine for certain military medical malpractice claims. The Department of Justice opposes these bills, and urges that they not be enacted. If the Congress, nevertheless, concludes that some further monetary compensation in addition to already available benefits is

necessary for service members injured by medical malpractice, then the Department of Justice recommends that an appropriate remedy be predicated upon the Military Claims Act, 10 U.S.C. § 2733 (MCA). The Department recently provided the Judiciary Committee with such a proposal.

I will first address the *Feres* doctrine, then S. 2490 and H.R. 1054, and conclude by addressing the amendment to the MCA proposed by the Department of Defense.

The Feres doctrine

Since these bills so directly impact upon the *Feres* doctrine, a brief explanation of the doctrine and its underpinnings is in order. The doctrine derives its name from the case of *Feres* v. *United States*, 340 U.S. 135, which was decided by the Supreme Court in 1950. In *Feres* and its progeny, the Court has held that members of the uniformed services cannot sue the federal government, other service members, or civilian government employees in tort for injuries which arise out of, or are incurred in, the course of activity incident to military service. The Court relied upon three principal reasons in coming to its decision:

(1) The existence and availability of a separate, uniform, comprehensive, no-fault compensation scheme for injured military personnel;

(2) The effect upon military order, discipline, and effectiveness if service members were permitted to sue the government or each other; and,

(3) The distinctly federal relationship between the government and members of its armed services, and the corresponding unfairness of permitting service-connected claims to be determined by nonuniform local law.

It is important to understand where the *Feres* doctrine fits into the body of law that governs tort suits involving the United States. To start with, the United States, as sovereign, is immune from suit unless it has consented to be sued, *United States* v. *Sherwood*, 312 U.S. 584 (1941). Further, the United States may define the terms and conditions upon which it may be sued. *Soriano* v. *United States*, 352 U.S. 270 (1957). The Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671, *et seq.*), constitutes a waiver of sovereign immunity, with certain specific limitations. *United States* v. *Sherwood, supra*; *Carr* v. *Veterans Administration*, 522 F.2d 1355 (5th Cir. 1975); *Childers* v. *United States*, 442 F.2d 1299 (5th Cir.), *cert. denied*, 404 U.S. 857 (1971); *Simon* v. *United States*, 244 F.2d 703 (5th Cir. 1957).

With *Feres* and its two companion cases, *Jefferson* v. *United States*, 178 F.2d 518 (4th Cir. 1949), and *Griggs* v. *United States*, 178 F.2d 1 (10th Cir. 1949), the Supreme Court was called upon to determine whether the Federal Tort Claims Act was intended to waive that aspect of sovereign immunity which concerned the relationship between soldiers and their government. The common fact underlying each case was that the injured person was a service member on active duty, who sustained injury due to the action or inaction of others in the Armed Forces. I specifically note that two of the cases concerned allegations of medical malpractice. Reflecting upon the body of law from which the Federal Tort Claims Act carved a limited exception, the Supreme Court stated:

> We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving.

340 U.S. at 141, and concluded:

> . . . that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

Id. at 146.

The holding of *Feres* has been broadly and persuasively applied by the courts and has now stood for 38 years without either legislative or judicial alteration. It is even stronger today as a result of the reaffirmation of its rationale by the Supreme Court in *United States* v. *Johnson*, — U.S. —, 107 S. Ct. 2063 (1987), and the Court's decisions in *United States* v. *Stanley*, — U.S. —, 107 S. Ct. 3054 (1987), *United States* v. *Shearer*, 473 U.S. 52 (1985); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); and *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, *reh'g denied*, 434 U.S. 882 (1977). *See also Atkinson* v. *United States*, 825 F.2d 202 (9th Cir. 1987), *cert. denied*, — U.S. —, 108 S. Ct. 1288 (1988). These cases recognize that the policy underpinnings of the *Feres* doctrine are as valid today as they were in 1950.

The first of the three reasons or policy factors underlying the *Feres* doctrine is the availability of a viable alternative to damage suits in the form of a comprehensive statutory compensation scheme. In *Feres*, the Supreme Court stressed that the Federal Tort Claims Act "should be construed to fit . . . into the entire statutory system of remedies against the government [and thereby create] a workable, consistent and equitable whole," 340 U.S. at 139, and that it was thus highly relevant that Congress had already provided, "systems of simple, certain, and uniform compensation for the injuries or death of those in the Armed Services." 340 U.S. at 144.

The present statutory compensation scheme has three discrete components. First, members of the uniformed services serving on active duty receive free medical care when injured or ill. *See, e.g.*, 10 U.S.C. §§ 3721, 6201, and 8721. They also receive unlimited sick leave with full pay and allowances until well or released from active duty. Survivors of service members are entitled to death gratuity benefits which include six months of base pay (10 U.S.C. §§ 1475–1482), as well as unique, subsidized insurance or insurance-type plans. 10 U.S.C. §§ 1447, *et seq.*; 38 U.S.C. §§ 765, *et seq.*

Second, Congress has established a comprehensive disability retirement system for service members permanently injured in the line of duty. *See* 10 U.S.C. §§ 1201 and 1401. Moreover, should a service member leave the service without seeking disability retirement, he may later request it. For example, section 1552 of Title 10, United States Code, provides that the Secretary of the Army, acting through the Army Board for the Correction of Military Records (ABCMR), may correct any military record when he considers it necessary to correct an error or remove an injustice. This authority has often been used to provide former service members who demonstrate that they suffer from a permanent disability as a

result of a service-related injury, with a retroactive, permanent disability retirement annuity and even back pay. See 32 C.F.R. § 581.3(b)(2) (1987); Sec. 4, A.R. 15–185.

Third, the Veterans Benefits Act provides yet another system of medical care, disability and death benefits for the service-disabled veteran and his family.[1] (A veteran eligible for both veterans disability benefits and military disability retirement benefits must choose which he will receive.)

The Supreme Court in *Feres* and the lower federal courts through the years have emphasized that the benefits available under the statutory system developed by Congress were not only adequate and comprehensive, but also compared extemely favorably with those provided by most workers' compensation statutes. *Zoula* v. *United States*, 217 F.2d 81, 84 (5th Cir. 1955). In 1977, the Supreme Court reaffirmed this consideration in the *Stencel* case, *supra*, by stating:

> A compensation scheme such as the Veterans' Benefits Act serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but it also clothes the Government in the "protective mantle of the Act's limitation-of-liability provisions." [Citation omitted.] Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, see *Feres*, 340 U.S., at 142–143, the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries.

431 U.S. at 673. The compensation scheme even prompted one court to comment as follows:

> The military service does not leave those permanently injured in the line of duty uncompensated. Congress has attended to such things in a reasonably adequate way. All we deny plaintiff-appellant is a remedy he likes better.

Bailey v. *Van Buskirk*, 345 F.2d 298 (9th Cir. 1965), *cert. denied*, 383 U.S. 948 (1966).[2]

The second consideration that has led to the broad application of the *Feres* doctrine by the courts through the years can be understood as an aspect of the traditional reluctance of American courts to intervene in military affairs, and the reluctance of the Congress to force such intervention. In *United States* v. *Brown*, 348 U.S. 110, 112 (1954), the Court said:

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[1] 38 U.S.C. §§ 301–362: Compensation for Service-Connected Disability or Death.
38 U.S.C. §§ 501–562: Pension for Non-Service Connected Disability or Death or for Service.
38 U.S.C. §§ 401–423: Dependency and Indemnity Compensation for Service-Connected Deaths.
38 U.S.C. §§ 601–654: Hospital, Nursing Home, or Domiciliary Care and Medical Treatment.
38 U.S.C. §§ 701–788: National Service Life Insurance.

[2] In addition to compensation for personal injury, it is worthy to note that the American service member has a plethora of other remedies available to seek equitable and criminal relief for grievances. For example, see:
10 U.S.C. §§ 938: Complaints of Wrongs;
10 U.S.C. §§ 801. *et seq.*: Uniform Code of Military Justice;
United States Navy Regulations, § 1107, Interview with Commanding Officer (Request Mast);
United States Navy Regulations, § 1106, Redress of Wrong Committed by a Superior.

> The peculiar and special relationship of the soldier to his superiors, the effects of maintenance of such suits on discipline and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court [in *Feres*] to read the Act as excluding claims of that character. [Citation omitted.]

Simply put, *Feres'* prohibition of intramilitary tort litigation derives from society's most elemental instinct: self-preservation through a strong military.

This consideration comes into play even where the issue is not military discipline in the strict sense. *United States* v. *Lee, supra.* What, in reality, is sought to be avoided is the general judicial intrusion into the area of military performance. *See Mattos* v. *United States,* 412 F.2d 793 (9th Cir. 1969); *Callaway* v. *Garber,* 289 F.2d 171 (9th Cir.), *cert. denied,* 368 U.S. 874 (1961). In *Henninger* v. *United States,* 473 F.2d 814 (9th Cir.) *cert. denied,* 414 U.S. 819 (1973), a medical malpractice case of relevance to the instant proposals, the plaintiff had elective surgery prior to being released from the service. He argued that since the operation was performed after he had been processed for discharge, permitting him to sue for injuries incurred during its course could not have the undesirable consequences feared by the Supreme Court. The appeals court rejected this argument, stating:

> To determine the effect that a particular type of suit would have upon military discipline would be an exceedingly complex task, as Henninger concedes. The proximity of the injury to discharge would be only one factor. Whether it resulted from an allegedly negligent order would be another. Whether it was caused by totally unrelated military personnel would be yet a third. In short, nearly every case would have to be litigated and *it is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs.* * * * This is a classic situation where the drawing of a clear line is more important than being able to justify, in every conceivable case, the exact point at which it is drawn. This is especially so because servicemen injured incident to their service are entitled to Veterans' benefits. [Italics added.]

Id. at 815–816 (citations and footnotes omitted). *See Del Rio* v. *United States,* 833 F.2d 282 (1987) (plaintiff's allegation of negligent prenatal care barred by *Feres;* medical malpractice cases would require courts to second guess military physicians' decisions and could impair essential military discipline, given plaintiff's position as a Navy hospital corpsman). *See also Bailey* v. *Van Buskirk, supra; Camassar* v. *United States,* 400 F. Supp. 894 (D. Conn. 1975), *Aff'd,* 1054 531 F.2d 1149 (2d Cir. 1976); *Knoch* v. *United States,* 316 F.2d 532 (9th Cir. 1963).

S. 2490 and H.R. 1054 would substantially blur the "clear line" that currently exists under the law. They would create an exception to a principle that now applies to virtually all facets of active duty, including recreation, *Hass* v. *United States,* 518 F.2d 1138

(4th Cir. 1975), off-hours secondary employment on a military base, *Miller* v. *United States,* 643 F.2d 481 (8th Cir. 1981) (*en banc*), and the activities of reservists, *United States* v. *Carroll,* 369 F.2d 618 (8th Cir. 1966). The disparity in treatment that these proposals would create between service members injured by malpractice in stateside medical facilities, and those injured by the negligence of their fellow service members anywhere else in the world, would open the door to total evisceration of the *Feres* doctrine just a bit further. A plethora of bills seeking additional exceptions to the doctrine would undoubtedly follow. Moreover, the courts might view enactment of either of these bills as an invitation to judicial assault, with potentially the same result. In the end, the applicability of the *Feres* doctrine, even to combat situations, may well be cast into doubt.

The third policy consideration, the federal nature of the relationship and the absence of analogous private liability, led the Supreme Court in *Feres* to conclude that service member's suit failed to state a claim under the Federal Tort Claims Act language which provides, "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674. On this point, the Supreme Court, in *Feres* stated;

> Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.

340 U.S. at 146.

An analogy to various state workers' compensation statutes which preclude suit by covered workers injured in the course of employment also comes to mind. *United States* v. *Lee,* 400 F.2d 558 (9th Cir. 1968), *cert. denied,* 393 U.S. 1053 (1969). The Supreme Court in *Feres* recognized the relationship existing between the United States and its military personnel as one "distinctively federal in character," and that application of local law to that relationship by virtue of the Federal Tort Claims Act would be inappropriate. 340 U.S. at 143. 28 U.S.C. § 1346(b). *See Atkinson* v. *United States, supra,* (availability of alternative compensation scheme and the distinctly federal nature of relationship between U.S. and members of its Armed Forces supports application of doctrine to this case). The fact that the location of the injury should determine the law to be applied "makes no sense and is unfair to the soldier who has no choice as to his location, particularly because of wide variances in local law." *United States* v. *United Services Automobile Association,* 238 F.2d 364, 366 (8th Cir. 1956). This is particularly so for the individual soldier who is a prospective defendant in a tort case, as well as for the United States itself.

While it sometimes is argued that the *Feres* doctrine is unfair to service members who are the victims of medical malpractice, as we have seen, the *Feres* doctrine is an adjunct to a compensation pack-

age available to service members which, on the whole, is far more generous, even-handed, and fair than compensation available to private citizens. This is because service members, unlike their civilian counterparts who suffer serious adverse consequences from medical care, generally are eligible for compensation whether or not those consequences are the result of substandard medical care. While, the certain cases, the compensation may be somewhat less than what might be available to a successful plaintiff who endures a medical malpractice lawsuit (just as workers' compensation systems generally provide lower benefits for work-related injuries than what may be available through tort litigation), the fact is that *all* of these service members are eligible for such compensation rather than only a small handful who in fact can show a causal link between their condition and substandard medical care. The arbitrariness and uncertainty associated with tort litigation is eliminated. Accordingly, from the perspective of *all* service members who suffer adverse consequences from medical care, the existing system of compensation is in many ways superior to what they would receive if they were private citizens.

Veterans' disability payments are also, in one important respect, more precisely compensatory for lost income than are lump-sum awards of tort damages. Monthly payments to veterans rise or fall in response to actual changes in levels of disability and continue throughout their lifetimes while disability persists. In this way, recompense more accurately tracks actual disability than do lump-sum awards which are necessarily based upon estimates of longevity and future disablement.

In any event, enactment of either of these bills would not, on balance, provide a better remedy for service members whose medical outcomes are disappointing. Under the present statutory compensation scheme, if the result of a medical procedure is for any reason unfavorable, a service member is entitled to continued care and benefits. He does not have to endure a lengthy court battle and demonstrate that his condition is due to the negligence of his doctor. Under the tort law system, however, an injured service member would be required to initiate a lawsuit and prove to a jury that his condition was proximately caused by medical malpractice before becoming entitled to collect a single dime in compensation.

It is absolutely essential to bear in mind that, under either of these bills, a service member is not guaranteed to recover anything by way of compensation; his "remedy" is purely speculative. Standing between injured service members with the right to initiate a lawsuit, and adequate compensation for their needs, is the problem-plagued American tort law system. To participate in it, these individuals will have to bear, as best they can, the transaction costs associated with modern lawsuits, prying, and often humiliating depositions and discovery, and years of waiting for an available trial date. Only then will they be in a position to endure the trauma of a jury trial in which, to secure any recovery at all, they must meet their burden of proof, overcome a host of technical defenses, successfully deal with issues concerning their degree of "fault", and convince a jury that a certain amount of money will "make them whole." Naturally, any awards that they actually recover will be

offset by attorneys' fees. Such are the vicissitudes of the present tort law system.

The Department believes that the policy considerations outlined above are as valid today as when first articulated. Indeed, with suits against the government and individual federal officers increasing in numbers every year, the rationale for the *Feres* doctrine is even more compelling today.

Negative impact of the proposed legislation

Accordingly, when S. 2490 and H.R. 1054 are examined in light of the three policy considerations upon which the *Feres* doctrine is based, the shortcomings of this legislation, as well as the problems which it will create, come disturbingly into focus.

Disruption of military units

One of the chief morale benefits of the existing statutory compensation scheme is that comparable situations are treated uniformly. The principle is as basic as it is essential: in a military organization, uniformity, consistency, and fairness are vital to the preservation of discipline, order, and cohesiveness. The proposed legislation threatens this principle and seeks to replace it with special compensation based upon the circumstances and situs of injury.

S. 2490 and H.R. 1054 apply only to those malpractice claims that occur in federal medical treatment facilities located in the United States. They would not allow suits for incidents that occur outside those facilities. Inevitably, disparities will arise. One sailor would be able to sue for injuries received at a naval hospital; another, similarly injured a few miles away aboard an aircraft carrier, would not. A soldier injured by medical malpractice at the Walter Reed Army Medical Center could sue, whereas another similarly injured in Europe, or on board a medical evacuation flight landing at Andrews Air Force Base, could not. Because the FTCA predicates liability on state law, a Marine in California might recover; but another, subject to a different body of state law in North Carolina, might not. Both Marines, however, would have one thing in common: their geographic duty stations are the result of military orders—not their personal choice. Selective special compensation dependent upon the fortuity of location falls far short of the even-handed fairness required to preserve military morale.

Of even greater concern is the fact that only claims based on malpractice will have access to this new remedy. Thus, under either proposal, a soldier who loses a leg on field maneuvers or on the base in a driving accident will be treated differently than one who loses a leg in a military hospital at the hands of a surgeon, although all three suffered the same injury as a result of someone else's negligence. More importantly, these bills could be read to significantly demean all injuries sustained in combat by providing the soldier injured on the battlefield with administrative compensation, while the soldier injured in a military hospital seeks a million-dollar damage award in federal court.

Disruptive impact of litigation

Military morale and discipline are also affected by the special relationship of a soldier to his superiors and his comrades-in-arms. American courts have acknowledged the unique nature of this relationship in their reluctance to intervene in military affairs. Permitting one soldier to sue another for the negligent performance of his duty is anathema to the teamwork, mutual trust, and discipline upon which our military system operates. Superimposing the adversarial process of civil litigation onto the Armed Forces, even in the limited area of medical malpractice, will have a disruptive influence on military operations. The litigative process itself assures that result: military plaintiffs and witnesses will be summoned to attend depositions and trails, and they will have to take time from their regularly assigned duties to confer with counsel and investigators. They may even have to be recalled from distant posts. Such disruptions are opposite to the interest of our national defense, which demands that soldiers, sailors, airmen, and Marines be ready to perform their duties at all times.

The impact of litigation on the "specialized community" of our fighting forces will have another invidious effect. It will undermine trust not only among individual services members, but also between soldiers and their organization. To allow soldiers to sue their government for damages, even if limited to medical malpractice, implies that the military has failed its own and that only by taking the "boss" to court can justice be attained. Fostering that attitude within a community which demands uncompromising trust and teamwork has dire implications for our national defense.

Negative influence on general military activities

The implications of retrenching on the *Feres* doctrine go far beyond providing tort remedies for injuries. Military health care practitioners often make determinations upon which commanders rely. The resulting decisions of the commanders frequently are contrary to the personal desires of the member and may have an adverse economic impact on him, *e.g.,* the physical disqualification of a pilot from flying status. To allow disgruntled service members to challenge their superiors by attacking the medical bases of those decisions would surely "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *United States* v. *Shearer,* 473 U.S. 52, 59 (1985).

The Services already have procedures in place by which erroneous medical judgments can be challenged, examined, and corrected. Allowing malpractice suits by military personnel would exact an intolerable price for the use of medical information in making personnel decisions. Such litigation would create an environment in which a commander could not act without looking over his shoulder for the process server.

Accordingly, it is the veiw of the Department of Justice that the *Feres* doctrine is a sound and necessary rule of immunity which permits the Armed Services to be free to go about their mission of defending the country. At the same time, the remedies available as an alternative to lawsuits, which we have previously outlined, pro-

vide a means for meaningful redress and compensating those who are injured in the course of military service.

Military Claims Act alternative

Nevertheless, should Congress conclude that some further monetary compensation in addition to available benefits is necessary for service personnel injured by military medical malpractice, the Department recommends that an appropriate remedy should be premised on the Military Claims Act. As we pointed out in our June 6 letter to the Chairman, the MCA amendment proposed jointly by the Department of Defense and Department of Justice is a far more reasonable method for providing such compensation than the tort litigation "remedy" proposed by S. 2490 and H.R. 1054.

Briefly stated, the proposed amendment to the MCA would apply worldwide, whereas S. 2490 and H.R. 1054 would both apply only to malpractice occurring in the United States. The MCA is less disruptive to military operations, in that military members are not subjected to the orders, dockets, and schedules of civilian judges and lawyers. The MCA facilitates prompt settlement of meritorious cases, using informal and less costly discovery procedures. It also operates efficiently and fairly in paying meritorious claims, and neutralizes the disparity among forums which results from differences in recovery potential from state to state. This is especially significant in that military personnel are subject to frequent transfer. Moreover, there are claims offices already in place with the proper training and support structures to investigate and process claims.

As we indicated in our correspondence, congressional concern for the quality of medical care provided to members of the Armed Forces should center on personnel and resources needed to assure the availability of the highest quality of care—not on allowing courts to second-guess military decisions. While S. 2490 and H.R. 1054 would create serious problems for the relationship of members of the Armed Services to their military departments, the proposed amendment to the MCA does not engender such concerns. Consequently, the Department would not object to substitute legislation premised upon the MCA, such as the one it proposed along with the Department of Defense.

CONCLUSION

Accordingly, it is the view of the Department of Justice that the *Feres* doctrine continues to be a sound and necessary limit on the FTCA's waiver of sovereign immunity, essential to the accomplishment of the military's mission. At the same time, the alternative remedies available to service members provide for meaningful redress and compensation to those who are injured in the course of military service. Any additional relief should take the form of an amendment to the Military Claims Act which provides for the submission of claims predicated upon military medical malpractice.

The Department of Defense's comments on H.R. 536 are as follows:

DEPARTMENT OF DEFENSE,
OFFICE OF GENERAL COUNSEL,
Washington, DC, March 13, 1989.

Hon. BARNEY FRANK,
Chairman, Subcommittee on Administrative Law and Governmental Relations, Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: This responds to your February 13, 1989 letter to the Acting Secretary of Defense concerning H.R. 536. As your letter stated, this bill is substantively the same as H.R. 1054, introduced in the 100th Congress.

You have offered this Department the opportunity to comment on H.R. 536. Our position on the proposed legislation remains unchanged since the last Congress. Accordingly, I enclose a copy of the testimony of the Honorable Kathleen A. Buck, then General Counsel of the Department of Defense, presented to the Subcommittee on Courts and Administrative Practice, Senate Committee on the Judiciary, on June 17, 1988.

We appreciate the opportunity to comment on your bill, and look forward to working with you on this important issue in the future.

Sincerely,

L. NIEDERLEHNER,
Deputy General Counsel.

STATEMENT OF KATHLEEN A. BUCK, GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Chairman Heflin and Members of the Subcommittee: I am pleased to appear before the Subcommittee today to present the views of the Department of Defense on S. 2490 and H.R. 1054, bills which would allow certain active-duty members of the Armed Forces to sue the United States for damages for injuries caused by improper medical care. I also appreciate the opportunity to discuss the merits of the Administration's proposal to amend the Military Claims Act ("MCA") to allow all active-duty military members to file administrative claims for medical malpractice.

Since its opinion in *Feres* v. *United States,* 340 U.S. 135 (1950), the Supreme Court has interpreted the Federal Tort Claims Act ("FTCA") as barring suits by servicemembers alleged injury was incurred incident to service. While we understand the arguments of those who oppose application of the *Feres* doctrine to medical malpractice claims, for the reasons we have stated in the past we do not believe the doctrine to be unfair or unreasonable in the context of medical malpractice. The relationship between members of the Armed Forces and their superiors is genuinely unique, with no analogous civilian counterpart. Delivery of medical care to members of the Armed Forces is inextricably intertwined with numerous aspects of military policy and decision making.

The Supreme Court's holding *Feres* was based on three considerations. First, permitting tort actions would adversely affect military discipline, morale, and effectiveness. Second, there is an elaborate system of compensation for military personnel injured incident to service that is available regardless of fault. Third, the court noted the distinctly federal relationship between servicemembers and their Government. Because of this relationship, which permits

the Government and not the member to select his or her duty station, it would be unfair to make recoveries dependent on disparate state laws, as is required under the FTCA. Indeed, as I will describe later in this statement, the FTCA does not even permit a suit, much less a judgment, against the United States for torts occurring in foreign countries, where many servicemembers are assigned.

As you know, S. 2490 and H.R. 1054 would partially abrogate the *Feres* doctrine. Neither bill is as straightforward or as simple as may appear at first blush; both would generate litigation far out of proportion to the proposed remedy. For example, the terms "peacetime" and "noncombatant" in S. 2490 are undefined, and in the context of contemporary world politics and warfare, are inherently ambiguous. Litigation of their meaning in a medical malpractice case, of itself, would have a disruptive effect on military discipline. More importantly, such legislation is based on a fundamental lack of understanding of the totality of the commitment that members of the Armed Forces are called upon to make. The need for complete commitment, discipline, and unfailing loyalty are not diminished in so-called "peacetime."

Nevertheless, if the Congress concludes that some further monetary compensation, in addition to the existing system of automatic, no-fault military and veterans benefits, is necessary for service personnel injured by military medical malpractice, we believe that the appropriate remedy should be an amendment to the MCA. The MCA is a well-established, administrative remedy for the payment of claims for property damage, personal injury, or death caused by either civilian or military personnel of the Armed Forces acting within the scope of their employment. Currently, active-duty military personnel may not file MCA claims for military medical malpractice. Our proposal would amend the MCA to give servicemembers this remedy. I am convinced that an amendment to the MCA is a far more practical and less disruptive method for providing such compensation than the tort litigation "remedy" proposed by S. 2490 and H.R. 1054.

In our opinion, the MCA approach has many advantages over amending the FCTA:

The Military Claims Act would protect military personnel regardless of where they are assigned. In amending the FTCA, S. 2490 and H.R. 1054 would cover only personnel in the United States. Considering that almost 500,000 U.S. troops are currently assigned in foreign countries, the devastating impact on military morale and discipline of denying approximately 25 percent of the Armed Forces a new benefit available to the other 75 percent can hardly be exaggerated.

The MCA would not put courts in the untenable position of second-guessing military decisions. Nor would it disrupt military operations by making servicemembers subject to the orders, dockets, and schedules of civilian judges and lawyers.

The MCA is efficient. Unlike S. 2490 and H.R. 1054, which would increase the burdens of an already saturated judicial system, the MCA approach would build upon an existing administrative system that can more readily accommodate the additional cases that would arise under the MCA amendment. S. 2490 and H.R. 1054 would re-

quire claimants to seek relief under the FTCA, which permits their lawyers to take fees of 20 percent of the award even if the claim is settled administratively and 25 percent if a case goes to court. The FTCA remedy would also result in litigation costs that the plaintiff—the injured soldier, sailor, airman or marine—must bear. The MCA amendment would avoid those costs and limit attorneys' fees to 10 percent of the award, ensuring that the injured party and not his or her lawyer receives the bulk of the compensation for that injury.

The MCA provides an unbiased review of claims. Claims are evaluated by judge advocates who are independent of the medical personnel who provided the care in question. Where necessary, outside medical consultants in the appropriate specialty area also review the care. Appeals of claims over $100,000 are decided by the Service Secretary concerned or a civilian Presidential appointee in his or her office. Before taking the potentially disastrous step of inserting the courts into the military claims process, I urge you to enact the Department's Military Claims Act proposal and then evaluate the Department of Defense's performance under the proposed MCA approach.

For over 30 years, the MCA has provided a vehicle for claimants overseas who are not *Feres*-barred to recover for malpractice. Thus, there is a system already in place that has a proven record for handling malpractice claims. It should be given the opportunity to work for the active-duty force as well, if additional compensation for malpractice injuries is to be provided.

The Military Claims Act provides an administrative remedy for the payment of claims for property damage, personal injury or death, caused by either civilian or military personnel of the Armed, Forces acting within the scope of their employment, or otherwise resulting from the noncombat activities of the Military Departments.

In some instances, active-duty servicemembers now may recover for damages by filing an MCA claim (e.g., personal property damage). On the other hand, active-duty servicemembers currently may not seek administrative relief under the MCA for medical malpractice. Under regulations issued by the respective Service Secretaries, the Military Department settle such claims when the claimed damages are established to have been proximately caused by the negligent or wrongful conduct of an employee. A claim, however, cannot be settled under this statute if it is cognizable under the FTCA. Active-duty military members injured incident to their service currently look to the no-fault compensation scheme provided through military and veterans' benefits.

While each Armed Force operates under procedures set out in its own regulations, meritorious claims cognizable under the MCA are generally processed by experienced claims judge advocates locally assigned to military installations and reporting directly to their respective claims division in Washington. Once a claim is filed, it is thoroughly investigated. Individual claimants, most of whom choose to be represented by privately retained counsel, are included in the investigative process and are encouraged to provide any relevant information to support their claim. Military investigators, in turn, share all information gathered with the claimant and his

or her attorney in an informal atmosphere of cooperation. When the facts establish that an injury is attributable to governmental negligence, settlement negotiations begin. A final offer is ultimately presented to the claimant, who may accept if in full satisfaction for the claim or appeal it to a higher authority. A claimant may also administatively appeal the government's finding of no liability.

Appeals for claims of $100,000 or less are made to the Judge Advocate General of the respective military service. Appeals of claims greater than $100,000 are made to the respective Service Secretary. Decisions by appellate authorities are final but may be reconsidered based upon newly discovered evidence.

There is no limitation on the amount that may be claimed. The first $100,000 of any approved claim will be paid out of the appropriated funds of the service involved. Amounts above $100,000 are paid by the General Accounting Office out of the judgment fund.

Claims for personal injury or death include such elements of damage as pain and suffering: loss of time, earnings, and services; diminshed earning capacity; permanment injury; physical disfigurement; anticipated medical expenses; death benefits; and, in general, all elements of damage recoverable in a suit at law. The claim may not, however, include medical, hospital, and burial expenses already paid by the United States. As discussed, one of the MCA's major advantages is its worldwide applicability. Unlike the FTCA, which is not applicable outside the United States, the MCA contains no such restriction and has been used for over thirty years to pay claims arising out of incidents overseas. For example, claims by military dependents for medical malpractice occurring in military medical facilities in foreign countries are paid under the MCA. Our proposal would bring active duty military personnel under the same coverage. By using the MCA for this purpose, service members would be guaranteed worldwide coverage for injuries resulting from the negligence of military health care personnel, provided such injuries do not result from treatment "furnished in a combat area, during an air, land, or sea maneuver or exercise, or in connection with the use of the Armed Forces in civil disasters or disturbances."

I would now like to discuss why the proposed legislation is ill-advised from the standpoint of national defense. To that end, I will address why retaining sovereign immunity with respect to tort lawsuits by military members is important to the United States, and point out the adverse effects that the passage of S. 2490 or H.R. 1054 would produce. Next, I will discuss why the legislation is unnecessary and why it will fail to accomplish the avowed goal of improving military medicine.

At the outset, I want to emphasize that all of us at the Department of Defense share Congress' concern for those who have suffered because of inappropriate medical treatment. Because of that concern, the Secretary of Defense, the Assistant Secretary of Defense for Health Affairs, the Surgeons General, the Judge Advocates General, the Inspectors General, and the audit agencies have all worked hard to improve the quality of military health care. I know of no one in the Department of Defense who is insensitive to the needs of military men and women. And I know of no one who

is more sensitive to these needs than the Secretary of Defense. Our highest priority is to ensure that their morale and motivation to serve remain high. Unquestionably, one of the essential ingredients for maintaining a well-disciplined, motivated armed force is the understanding by servicemembers that they are being treated fairly in all respects, including receiving fair compensation for service-connected injuries. The key issue before us, however, is whether removing the *Feres* bar to medical malpractice cases would further the legitimate ends of discipline, morale, and fair compensation. I believe it would not.

THE FERES DOCTRINE IS CRUCIAL TO THE MAINTENANCE OF GOOD ORDER AND DISCIPLINE

The *Feres* doctrine holds that servicemembers injured incident to service may not sue the United States. Because of the inherently disruptive nature of litigation, the concept of soldiers suing their government is alien to our traditional philosophy of military discipline and Anglo-Saxon jurisprudence. Thus, courts have recognized the unique nature of the military and its indispensable role in preserving the nation, and have been reluctant to intrude into the military environment. Good order and discipline are not merely "buzz words." Rather, they are dynamic values, vital to the effectiveness of our armed forces.

The *Feres* doctrine has been applied in deciding recent cases that have constitutional dimensions: *Chappell* v. *Wallace,* 462 U.S. 292 (1983); *United States* v. *Shearer,* 473 U.S. 52 (1985); *United States* v. *Stanley,* 107 S. Ct. 3054 (1987); and *United States* v. *Johnson,* 107 S. Ct. 2063 (1987). In each case, the Supreme Court barred suit. The essence of these decisions is that even when constitutional deprivations are alleged, the remedy must reflect the unique nature of military service. This does not mean military authorities may transgress individual rights with impunity. For aggrieved servicemembers, numerous forms of redress are available within the military structure, in addition to the right to communicate directly with the Congress or the President. Moreover, if the conduct complained of violates law or regulation, an array of administrative actions and criminal proceedings, such as courts-martial, are available to deal with transgressors. For military personnel who suffer physical injury or disability, Congress has created a comprehensive compensation scheme to provide benefits—both financial and medical—without regard to fault.

The Supreme Court has repeatedly recognized that the zone of interests peculiar to the military requires judicial protection. We urge Congress to continue this same approach.

Our greatest concern with the proposed bills is the prospect of members of the Armed Forces bringing suit against the government. Lawsuits have the great potential of disrupting discipline and military operations. As the United States Court of Appeals for the Ninth Circuit stated, "To determine the effect that a particular type of suit would have upon military discipline would be an exceedingly complex task * * * [N]early every case would have to be litigated and *it is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs.*" *Hen-*

ninger v. *United States*, 473 F.2d 814, 815–816 (9th Cir. 1973) (emphasis added).

Several hypothetical cases illustrate the potential for misplaced attacks upon military decisions through the FTCA suits that would be authorized by S. 2490 and H.R. 1054. Consider the following:

(a) A pilot is ordered removed from flight status because of a medical condition diagnosed by a flight surgeon. The pilot (whose career and therefore livelihood are in jeopardy), instead of following his orders, attempts to circumvent those orders through a malpractice suit alleging that the diagnosis was improper.

(b) A commander denies a security clearance to a soldier based upon a mental health examination. The soldier brings suit alleging misdiagnosis and mental anguish as a result of the diagnosis.

These types of decisions are made daily in almost every command in the military. They are not always purely medical decisions. Frequently, non-medical decisions made by commanding officers are based on factors which may have as their basis a physical or mental health report. Subjecting these decisions to judicial scrutiny concerning their medical basis would have a severe negative impact on the discipline of the military personnel who would see medical personnel and commanders hailed into court to justify their decisions. This situation could foster the belief that no order is lawful and final until the courts have ruled that it is.

One further example will show how good order and discipline could be affected. Assume that S. 2490 and H.R. 1054, or similar legislation, is enacted. A servicemember in an overseas command is scheduled for surgery. He demands that it be performed in the United States (so he may sue if, in his judgment, the surgery is not successful). Does the commanding officer send this individual back? Does he medically discharge him? Does he allow the servicemember to make the decision or barter for the choice? Does he court-martial him for disobeying the order to go to the hospital? What is at issue here is the authority of the commanding officer; the knowledge that such authority was challenged takes no time at all to spread throughout the unit, and that is what serves to undermine the good order and discipline, as well as the cohesiveness, of the unit.

These examples serve to point out that the implications of forgoing sovereign immunity to permit malpractice suits by active-duty members go far beyond furnishing a money-damage remedy for physical injuries. Practically all military medical decisions in the United States and the administrative actions that flow from them would become fair game in FTCA suits under the proposed bill. Military personnel decisions would be seriously impaired, remaining in limbo for lengthy periods until judicially resolved.

Although the inevitable entangling of administrative personnel actions and medical malpractice suits is sufficient reason not to support S. 2490 and H.R. 1054, this legislation has other, equally serious disadvantages.

THE LOSS OF THE FERES DOCTRINE WOULD ADVERSELY AFFECT MORALE

The proposed amendments to the FTCA and the Administration's MCA bill would both create a privileged class of claimants.

We, therefore, continue to believe that the best solution is to examine the adequacy of benefits for all military members who are injured by negligence incident to duty, regardless of its source. If, however, Congress decides to legislate only for the victims of military medical malpractice, the MCA approach is vastly preferable to either S. 2490 or H.R. 1054. Unlike those bills, the MCA would cover virtually all military medical malpractice, not just malpractice that occurs in the United States or in domestic fixed medical treatment facilities.

One example illustrates this point. A surgeon in a military stateside hospital makes an error. As a result, servicemember A suffers paralysis. Under the proposed legislation, he could sue the United States. Servicemember B is walking on the sidewalk outside the hospital and is hit by a government vehicle driven negligently by a motor pool driver. Servicemember B is paralyzed as a result of his injuries. He may not sue, although he has virtually the same disability.

How does a commanding officer explain this distinction to the people he must lead? How does he justify it? Servicemembers understand they give up certain rights when they enter the service and they learn that they receive certain benefits. One of those benefits is a system that provides them sure and swift compensation if they are injured incident to their service, regardless of fault. Without question, that compensation should be adequate and fair. It should compensate servicemember B in the same manner as servicemember A. If that compensation is deemed inadequate, that is what ought to be corrected. Courts have often cited the simple, certain, and uniform compensation for injuries or death of those in the Armed Services. This uniformity would be destroyed by statutory exceptions carving out privileged areas of litigation, and with it will go the understanding that all are being treated fairly.

As a Task Force of the New York State Bar Association recently recognized, this would be patently unfair. Indeed, the Task Force's report characterized the prospect of barring one soldier who is injured in the battlefield from suing but permitting another to sue for malpractice as "abhorrent." Task Force report at 3.

THE PROPOSED LEGISLATION ERODES UNIFORMITY

Opponents of the *Feres* doctrine do not recognize that one of the chief morale benefits of the existing compensation scheme, and of our Military Claims Act bill, is that comparable situations are treated uniformly. The principle is as basic as it is essential: In a military organization uniformity, consistency, and fairness are vital to the preservation of discipline, order, and cohesiveness. S. 2490 and H.R. 1054 threaten this principle and seek to replace it with special compensation based upon the circumstances and situs of injury.

H.R. 1054 applies only to those malpractice claims that occur in the United States; and S. 2490 applies to claims that occur "in a hospital or other medical facility of the Armed Forces" not in foreign countries. Neither would allow suits for other incidents. Thus, we face the possibility of one sailor being able to sue for injuries that occur in a naval hospital, where a sailor similarly injured only

several miles away abroad an aircraft carrier will be denied comparable relief. Or a soldier injured by medical malpractice at Walter Reed Army Medical Center could sue, whereas another soldier in Europe or on board a medical evacuation flight overseas could not. If we recall our earlier example of the servicemember who refuses his consent to surgery unless it is performed back in the United States, it becomes obvious that disparate treatment of injuries based on the geographic location of an accident is as ill-advised as is disparate treatment based on how the injury occurred.

Because the FTCA bases liability on state law, a marine in California might recover, but another marine, subject to a different body of state law in North Carolina, might not. Both marines, however, would have one thing in common: their duty stations are the result of military orders, not their personal choice. Selective special compensation dependent upon fortuity of location falls short of the even-handed fairness we must exercise to preserve military morale.

We have not accepted the argument that medical malpractice is a unique type of negligence. S. 2490 and H.R. 1054 provide a remedy only for malpractice, but not for other forms of negligence. If a solder loses a leg on field maneuvers, on the base in a driving accident, or in the hospital at the hands of a surgeon, he suffers the same injury. More importantly, this bill would significantly demean all injuries sustained in combat in identifying the tort remedy as ideal, and then denying it to servicemembers who fall in battle. To provide special compensation for the medical injury, while denying it for other equally painful and debilitating losses, will promote neither the appearance nor the reality of fairness.

We fully support a compensation system for all service-connected injuries that is equitable and reflects current economic conditions. Just as Congress has made the Federal Employees' Compensation Act and the Longshore and Harbor Workers' Compensation Act the exclusive remedies for injuries to covered personnel, we suggest Congress should maintain the existing, exclusive compensation system for all service-connected injuries, including those from military medical malpractice. This will have a far more positve impact on moral than creating a special class of litigants whose right to recover depends upon where and how they were injured and not on the injury they suffered.

In short, permitting tort lawsuits for medical malpractice injuries would have a negative effect upon the military mission, discipline, and morale. Moreover, the Department of Defense cannot discern a positive benefit to be derived from S. 2490, H.R. 1054 and similar bills—least of all for military health care.

In recognition of the persistent support by some in Congress for special treatment of injuries to military members resulting from medical malpractice, the Department of Defense has recommended that additional compensation for this type of injury be provided under the MCA. This, of course, does not overcome the problem of disparate treatment for one kind of injury, as described above.

PERMITTING MORE LAW SUITS WILL NOT IMPROVE MILITARY MEDICINE

The proposed legislation is grounded partially upon a perception that military medicine is in a state of crisis and requires immedi-

ate action to remedy its shortcomings. Last Congress, for example, the House Judiciary Committee favorably reported a bill identical to H.R. 1054 with the observation that "this legislation should result in improved military medical care, because of the threat of suit." H. Rep. No. 288, 99th Cong., 1st Sess. 4 (1985). This proposition cannot withstand close analysis.

First, medical malpractice suits under the FTCA are permitted for the approximately 70 percent of the patient population served by military medical facilities who are military retirees and dependents of active-duty and retired personnel. It defies belief to assert that increasing the potential tort claim and litigation case load by the remaining 30 percent would achieve any beneficial effect upon the quality of health care. Any argument that military physicians provide better care to those who may sue for malpractice is a gratuitous insult to this dedicated group of officers who are bound by the same ethical requirements in treating all of their patients.

Next, we are all aware of the ongoing malpractice liability crisis in the civilian medical community. In several areas, notably southern Florida, the crisis has resulted in the denial of health care in some hospitals. Instead of opening new avenues for malpractice recovery, state legislatures are now passing tort reform measures designed to restrict the amount of recovery, to limit attorney's fees, and to allow consideration of collateral recoveries in computing judgments. The point is that, notwithstanding all the malpractice suits in the civilian sector, malpractice claims are still on the rise. In other words, if the number of malpractice actions reflects the incidence of malpractice, then the threat of suit does nothing to improve medical care.

Some supporters of the proposed legislation may contend that if a suit is filed, the negligent practitioner will correct his behavior to avoid paying another judgment and defending another case. This "deterrence" theory is misplaced for two reasons. First, the traditional purpose of tort law in our jurisprudence has been to compensate, to make whole. The punitive feature of tort law expressly was made inapplicable to the United States in the FTCA itself. Second, when malpractice claims are filed against military physicians, they are immunized from suit under 10 U.S.C. § 1089. This immunity is essential. Otherwise, we would be unable to recruit and retain physicians because of high malpractice insurance premiums. Since military physicians do not have to pay malpractice judgments out of their own pockets, the deterrent effect ascribed to permitting more lawsuits is nonexistent. The only apparent deterrence in the civilian sector, where physicians (or their insurers) are liable for malpractice judgments, is that physicians are discouraged from practicing in high-risk medical specialties such as obstetrics, and more and more insurers refuse to provide coverage for those who continue. No improvement in the quality of care is demonstrated.

The Department of Defense is not only dedicated to providing our personnel with the best health care possible, but has taken aggressive action to assure it. The watchwords of today are "quality assurance" and "provider accountability." Lawsuits are not needed, nor would they be effective to encourage us to do better. Indeed, the performance of military physicians is reviewed with greater

frequency and more vigor, and against tighter standards, than in any health care system we know.

In short, we in the Department of Defense have not been deaf to the critics of medical care in the Armed Services, nor do we have a callous disregard for those who have been injured. Instead, we submit, a litigious approach to eliminating medical malpractice misses the mark and will cause serious problems for military morale and discipline, thereby jeopardizing the ability of the Department of Defense to perform its mission.

CONCLUSION

To recapitulate:

The notion of military personnel suing the United States in tort runs counter to the accumulated wisdom and experience of all three branches of government.

Enacting S. 2490 or H.R. 1054, thereby creating the right to sue for malpractice, will open a Pandora's box of administrative, morale, and disciplinary problems in the Armed Services.

Such a law would in fact threaten morale, as it would create a special class of litigants favored over all others.

Medical care in the military services is not in a state of chaos and disrepair. The Congress should not topple the well-established proscription against tort suits by active-duty military personnel in an ill-conceived effort to correct a problem that does not exist.

Tort lawsuits have never stopped or even diminished malpractice. Instead, the Department of Defense should be encouraged to press forward with aggressive quality assurance programs and with measures holding physicians accountable for their actions. These mechanisms are far more effective than a judgment paid by the Treasury, because our quality assurance and accountability programs benefit the entire patient population, not just those who win a lawsuit.

A compensation scheme already exists that can fairly compensate all injured persons regardless of the cause of the negligence. If that compensation is inadequate, let's correct it.

The proposed legislation would create inequities in geographical areas covered. Servicemembers overseas could not sue; their compatriots in the United States could.

The proposed legislation is an expression of concern for the plight of those who have suffered real injuries. But its premises are faulty. First, neither H.R. 1054 nor S. 2490 would reduce malpractice or improve morale. Only the Department of Defense can do that as we aggressively pursue improved health care. Second, the financial objective of these bills would be best advanced by a thorough review of our no-fault benefits system, which should provide adequate, realistic compensation for service-connected injuries on a uniform basis without regard to the fortuitous circumstances of individual claimants.

We recognize, however, that Congress may wish to focus its attention on the narrow issue of compensation for active-duty personnel who have been injured by military medical malpractice. Rather than eviscerate the *Feres* doctrine, which has well served the

nation and its Armed Forces for thirty-eight years, we support the Administration's proposed amendment of the Military Claims Act. This bill would provide a fair, efficient, and proven administrative remedy to the active-duty victims of medical malpractice, just as it has to their dependents overseas for over thirty years. The Military Claims Act approach would satisfy the perceived need for additional compensation but not endanger the vitality of our Armed Forces. The Department of Defense therefore favors its enactment as far preferable to amendments to the FTCA.

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